In The Supreme Court

Appeal from the Court of Appeals
Murphy, P.J., and Griffin, and White, J.J.

CITY OF TAYLOR, MICHIGAN,

Plaintiff-Appellee,

-vs-

THE DETROIT EDISON COMPANY,

Defendant-Appellant,

_____/

Docket No. 127580

Court of Appeals No. 250648

Wayne County Circuit
Court No. 02 221723 CZ

BRIEF ON APPEAL OF PLAINTIFF-APPELLEE CITY OF TAYLOR, MICHIGAN

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

This Court has jurisdiction of this appeal pursuant to MCR 7.301 and 7.302. The Detroit Edison Company ("Edison") timely sought leave to appeal from the Court of Appeals decision in favor the City of Taylor ("City") issued on September 14, 2004 by filing an application with the Court on December 9, 2004. This Court granted the application in an order issued on October 6, 2005.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I.

ARE CITIES CONSTITUTIONALLY AUTHORIZED TO REGULATE UTILITY STRUCTURES IN THE RIGHT-OF-WAY OF CITY STREETS INCLUDING REQUIRING RELOCATION OF FACILITIES AT THE UTILITY'S EXPENSE WHEN A LEGITIMATE GOVERNMENT PURPOSE SUPPORTS A REASONABLE REGULATION REQUIRING THE CHANGE?

The Defendant-Appellant Detroit Edison Company answers "No."

The Plaintiff-Appellee City of Taylor answers "Yes."

The Court of Appeals answers "Yes."

The Wayne County Circuit Court answers "Yes."

II.

DOES A CITY'S CONSTITUTIONALLY-PROTECTED RIGHT TO CONTROL ITS STREETS ALLOW IT TO REQUIRE A UTILITY TO BEAR ITS COSTS FOR RELOCATING UTILITY EQUIPMENT AS PART OF A REASONABLE POLICE POWER MEASURE?

The Defendant-Appellant Detroit Edison Company answers "No."

The Plaintiff-Appellee City of Taylor answers "Yes."

The Court of Appeals answers "Yes."

The Wayne County Circuit Court answers "Yes."

III.

IS THE CITY'S ORDINANCE PREEMPTED?

The Defendant-Appellant Detroit Edison Company answers "No."

The Plaintiff-Appellee City of Taylor answers "Yes."

The Court of Appeals answers "Yes."

The Wayne County Circuit Court answers "Yes."

IV.

DID THE CIRCUIT COURT HAVE JURISDICTION BECAUSE THE CASE INVOLVES THE CITY'S CONSTITUTIONAL POWERS AND FALLS OUTSIDE THE MPSC'S JURISDICTION?

The Defendant-Appellant Detroit Edison Company answers "No."

The Plaintiff-Appellee City of Taylor answers "Yes."

The Court of Appeals answers "Yes."

The Wayne County Circuit Court answers "Yes."

COUNTERSTATEMENT OF FACTS

A. NATURE OF THE ACTION.

The City of Taylor ("City") filed this action seeking a declaratory judgment regarding enforcement of city ordinances governing the location of utility poles and other facilities used by public utilities and, in particular, its right to require the Detroit Edison Company ("Edison") to relocate its transmission lines and related structures underground along the northbound and southbound Telegraph corridor as part of a reconstruction project and to bear the costs of doing so. (Complaint, ¶¶ 29-31, Apx 13b). The City relied upon a series of local ordinances, state statutes, and constitutional provisions in support of its legal authority. (Complaint, ¶¶ 9, 22-26, Apx 8-12b). The circuit court entered judgment in favor of the City on the basis that the City's ordinances comply with the law of the State and that Edison was, therefore, required to relocate its overhead lines in connection with the Telegraph Road improvement project and to reimburse the City for the monies the City had advanced related to this construction. (Order Granting Plaintiff's Cross-Motion for Summary Disposition As To Declaratory Judgment and Other Relief, 6/02/03, Apx 207b; Order Denying Motion to Set Aside Orders and Findings, 6/27/03, Apx 218b). The Michigan Court of Appeals upheld the judgment in favor of the City. *City of Taylor v The Detroit Edison Co*, 263 Mich App 551; 689 NW2d 482 (2004) (Court of Appeals Opinion, 9/14/04, Apx 256b).

B. COURSE OF PROCEEDINGS.

The City commenced this action on June 25, 2002, by filing its complaint for declaratory judgment, noting the existence "at present" of "an actual and justiciable controversy between the parties," and seeking the Court's "declaration that Detroit Edison is obligated on behalf of itself and the Detroit Edison lessees to relocate and pay the entire cost of underground relocation of

alleys, or other public places "of any county, township, city or village" for its utility structures "without consent of the duly constituted authority" of the local entity. It spells this out in two clauses, the first of which deals with the placement of utility structures, and the second of which deals with the transaction of local business. Encompassed within it is a recognition that a private business has no right to operate within public streets without permission; it operates at the grace of the consenting jurisdiction.

The first sentence sheds light on the nature of the relationship between a city and a utility operating within the city and thus offers guidance as to a city's right to enact police power regulations requiring relocation of structures within the public streets. Michigan courts, like those of other jurisdictions, consider a franchise to be a contract between the parties. See e.g., *New Orleans Gaslight Co v Drainage Comm of New Orleans*, 197 US 453; 25 S Ct 471; 49 L Ed 831 (1905); *New Orleans Public Service v City of New Orleans*, 281 US 682; 50 S Ct 449; 74 L Ed 1115 (1930); *Kalamazoo v Kalamazoo Circuit Judge*, 200 Mich 146; 166 NW 998 (1918). But a franchise (or contract) does not immunize a utility from compliance with valid local laws. Courts have repeatedly upheld city regulations regarding the use of city streets even when a utility is operating under a franchise.

Contrary to Edison's position that once consent is given, a city loses its right to regulate, it is hornbook law that a city cannot contract away its right to exercise police power. See e.g., 6A Fletcher Cyclopedia of the Law of Private Corporations § 2887 (2005). *Detroit v Michigan Bell Telephone Co*, 374 Mich 543; 132 NW2d 660 (1965) illustrates the application of these principles. There, the city, as part of a redevelopment project, vacated certain dedicated streets and alleys in which private utilities had previously been granted the right to maintain their facilities. The city directed that the utilities move their facilities to other streets and alleys without compensation. Both Michigan Bell and Edison argued that the city had acted unreasonably in the exercise of the police power.

and Order, 8/19/03, p 3), quoting *Michigan Bell v Detroit*, 106 Mich App 690, 695-696; 308 NW2d 608 (1981) *lv den* 414 Mich 869; 327 NW2d 286 (1982).

The Court of Appeals upheld the circuit court's decision to hear the case rather than defer to the Michigan Public Service Commission on the basis of the primary jurisdiction doctrine. (Court of Appeals, p 1, Apx 256b). The Court of Appeals reasoned that this is not a case in which the MPSC's specialized knowledge is invoked since the matter does not directly involve utility rate structures, licensing, or tariffs. (*Id.*, p 2, Apx 257b). The Court pointed out that the case "presents a question of law regarding a municipality's authority." (*Id.*) The Court also rejected the primary jurisdiction doctrine because the need for uniformity does not raise a concern since the matter could be reached equally well through the courts on a non-rate, licensing, or tariff matter. (*Id.*) The Court of Appeals also decided that the failure to defer to the MPSC would "not have an adverse effect on the MPSC's performance of its regulatory duties." (*Id.*) It based this conclusion on the fact that the ordinance did not conflict with or throw the regulatory scheme out of balance. (*Id.*)

The Court of Appeals also rejected Edison's contention that the City exceeded its authority in mandating that Edison relocate its lines and facilities at its own expense. (*Id.*, p 3, Apx 258b). The Court of Appeals pointed out that local governments retain the right to reasonable control of their rights-of-way and that the State had not chosen to occupy the field. (*Id.*) Relying on *Detroit Edison Co v Detroit*, 208 Mich App 26, 30; 527 NW2d 9 (1994), *Detroit Edison Co v Detroit*, 332 Mich 348; 51 NW2d 245 (1952), *Detroit Edison Co v SEMTA*, 161 Mich App 28; 410 NW2d 295 (1987), and *Detroit Edison Co v Detroit*, 180 Mich App 145; 446 NW2d 615 (1989), the Court of Appeals ruled that relocation costs may be imposed on a utility if the costs are necessitated by a municipality's exercise of a governmental function. (*Id.*)

The Court found that the relocation was necessary for a governmental function and for that reason, the costs could be imposed on Edison.

The Court of Appeals rejected Edison's contention that the ordinance was unreasonable and refused, because it was not raised in the trial court, to consider Edison's argument that Telegraph was a state trunk line highway. (*Id.*, p 4, Apx 259b). The Court also dismissed Edison's assertion that the City's ordinance was preempted because the MPSC's jurisdiction does not provide that its authority is exclusive, because Edison offered no support for its assertion that the legislative history supports total preemption by the MPSC, because the pervasiveness of the regulatory scheme does not support preemption, and because the nature of the subject does not demand exclusive state regulation. (*Id.*, p 5, Apx 260b).

The Court of Appeals agreed with the City that the circuit court did not abuse its discretion in granting a declaratory ruling and in concluding that Edison had notice and an opportunity to be heard that satisfied due process, but the Court of Appeals remanded for the court to "hear evidence regarding the agreement of the parties concerning installation of the conduit and their actions pursuant to that agreement." (*Id.*, pp 7-8, Apx 262b-263b). Thus, the Court remanded the case to the circuit court for "further consideration of this issue." (*Id.*)

C. THE CITY OF TAYLOR'S CHARTER AND ORDINANCES RELATING TO ITS RIGHT-OF-WAYS.

Edison has claimed throughout that the underground relocation of its overhead lines must be at the sole expense of the City. In turn, the City asserts that it has the right to control its public ways and to require the underground relocation of Edison (and Edison lessees) overhead lines, poles, and related overhead facilities and equipment and that Edison and Edison lessees should bear the costs of complying with the City's valid police power ordinance. The City pointed to the following authority in support of its ordinance:

- Michigan Constitution 1963, art 7, § 25 and § 29
- Home Rule Act—MCL § 117.4h(1), (2), (3).
- Taylor City Charter—Chapter XVIII, Sections 18.1, 18.2 and 18.6.
- City Regulatory Ordinances including:
    (1) Taylor Utilities and Telecommunications Right-of-Way Regulatory Ordinance ("ROW Ordinance") (#97-305).
    (2) Taylor Michigan Cable Communications Regulatory Ordinance ("1980 Cable Ordinance") (#80-113).
    (3) Ameritech New Media Cable Franchise Agreement with City of Taylor dated 4/10/98 ("Ameritech Franchise Agreement").
    (4) Taylor Michigan Cable Communications Regulatory Ordinance ("1998 Cable Ordinance") (#98-311).
- Telegraph Road Improvement and Underground Relocation of Overhead Lines Ordinance ("Telegraph Relocation Ordinance") (#00-344).

(Complaint, p 8, ¶ 22, Apx 8b).

In particular, and based on the City's constitutional and statutory authority, the Taylor City Charter Chapter XVIII entitled "Privately Owned Utilities," provides in part:

> Section 18.1 Franchise Required
>
> No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of the City of wires, poles, pipes, tracks, or conduits without the consent of the Council; nor may it conduct a local business in the City without first obtaining a franchise therefore from the City.
>
> Section 18.2 Regulatory Powers
>
> The City shall have the right (a) to regulate public utilities; (b) to regulate the location of poles and other facilities used by public utilities; (c) to require that wire in streets and alleys be placed underground.
>
> * * *

Section 18.6 Further Regulatory Powers

The grant of every franchise shall be subject to the right of the City whether in terms reserved or not, to make all regulations which shall be necessary to secure in the most ample manner the safety, welfare and accommodation of the public, and the right to make and enforce all such regulations as shall be reasonably necessary to secure adequate, sufficient and proper service, extensions and accommodations for the people, and insure their comfort and convenience.

(Complaint, pp 8-9, ¶23, Apx 8b-9b). The City also relied on its Right-of-Way Ordinance, enacted in 1997:

a. Section 2 entitled "*Legislative Findings and Purposes*" provides:

(e) The City has the authority to manage its public rights-of-way and to grant permits, licenses, and franchises for utilities, cable television and/or Telecommunication systems/services offering public or private line video, data or voice services using or crossing public rights-of-way in the City. This Ordinance is intended to minimize the disruption to the public rights-of-way and to require those who seek to construct utilities, a cable television and/or Telecommunications system to cooperate in the construction and the restoration of public rights-of-way and of both overhead and underground lines. The City finds that it has too many unsightly overhead lines and poles in some sections of the City and that they are proliferating, adversely affecting the public safety, detracting from property values and reaching maximum safe capacity of poles and underground spaces. The City further finds that public health, safety and welfare is better served by requiring installation of new utility lines and wires in underground conduit wherever practical.

b. Section 6 entitled "*Cessation of Rights and Alterations*" provides:

Any right acquired under any such permit may cease by Order of the Mayor or Director of Public Works or, in the case of any City park or City park right-of-way, by the Director of Parks and Recreation. All equipment and property described under such Order shall be removed or relocated at the expense of the named Permittee. In the event that at any time the City shall lawfully elect to alter or change the grade or location of any street, alley or other public rights-of-way or to install other public improvements including, but not limited to water mains, sanitary sewers, storm sewers, streets, street paving, alleys, sidewalks and driveways, the Permittee shall remove, relay, and/or relocate its equipment and property at Permittee's sole cost and expense. Upon failure to remove, relay and/or relocate its

equipment and property upon Order of the City, Permittee shall reimburse the City for its costs and expenses in effecting the same. The City may utilize the proceeds of any required security by way of letter of credit or cash escrow account or otherwise for such purposes.

c. Section 18 entitled "*Retention Control of Public Places*" provides:

Nothing contained herein shall be construed to alienate the title of the public in and to any public rights-of-way or any portion thereof, nor shall anything herein be construed in any manner as constituting a surrender by the City of its general powers with respect to the subject matter hereof, or with respect to any matter whatsoever, or in any manner be construed as limiting the right of the City to regulate the use of and access to any public rights-of-way within its jurisdiction and to otherwise exercise its police powers to protect the public health, safety and welfare.

(Complaint, pp 9-10, ¶24, Apx 9b-10b).

The City's Telegraph Relocation Ordinance, enacted on May 16, 2000, applies directly to the project and controversy between Edison and the City:

a. Section 2 entitled "*Legislative Findings and Purposes*" provides:

(a) The City of Taylor ("City") is currently in the process of designing and planning, in cooperation with the Michigan Department of Transportation ("MDOT'), for the major reconstruction of the entire length of northbound and southbound Telegraph Road ("Telegraph") in the City. In addition, the City intends to make other, infrastructural improvements to and along Telegraph, including new water mains on either side of Telegraph, installation of new sidewalks, construction of conduit for median irrigation and placement of new streetlights.

* * *

(c) As part of the process of improving Telegraph and its related infrastructure, the City has determined that it is a necessary public improvement to relocate underground all overhead electric utility, cable television, telecommunication and other lines and wires currently running along, across, adjacent to and/or over Telegraph, its intersections and to private property adjacent to Telegraph. In connection with this line and wire relocation, the City has determined that all poles and related overhead facilities equipment to the overhead lines should also be removed to the maximum extent possible.

(d) The governmental functions and purposes of this relocation of overhead lines and wires and removal of poles and related overhead facilities equipment include, but are not limited to, the following public health, safety and welfare concerns of the City:

(1) To allow for the public improvement of the reconstruction and repair of the entire length of Telegraph in the City, and improvement and repair of related infrastructure including sidewalks, water mains, sewers and street lighting.

(2) To relieve the utility, transportation and infrastructural burden in the Telegraph corridor, which is a heavily-congested business district in the City, serving hundreds of businesses and accommodating thousands of vehicles daily traveling at high rates of speed along Telegraph and into and out of these businesses.

(3) Improvement of the City's aesthetic environment through removal of unsightly poles, lines, wires and related overhead facilities equipment out of view of the public.

(4) Enhancement of traffic operational safety in the City by the removal of utility poles and overhead lines, wires and related overhead facilities equipment in order to improve visibility, sight lines and eliminate vehicular accident impacts on poles, overhead lines and wires and other overhead facilities equipment.

(5) To better protect electrical, cable, telecommunications and other service lines, wires, poles and related overhead facilities equipment from weather damage, vehicle accident damage and other causes, in order to reduce service interruptions to residents of and businesses located in the City.

(6) Enhancement of the safety of City residents and persons traveling on Telegraph from falling or down lines, wires, poles and overhead facilities equipment.

(7) Improvement of operational reliability of electrical utility, cable television, telecommunications and other services currently provided by overhead lines and wires.

(8) Enhancement of existing and potential business development and other land use along Telegraph recognizing the historical pattern of development including different (a) physical location of buildings and curb cuts, (b) set backs, (c) location of and limits to rights-of-way,

and (d) location of utility poles and overhead lines and wires. [Complaint, ¶25, Apx 10b-12b.]

b. Section 3 entitled "*Relocation Directed*" provides:

> Upon the adoption of this Ordinance and upon written notice from the City, all public utilities, telecommunications providers, cable television providers (collectively the "Companies"), state and county agencies ("Agencies") and all other individuals, firms, partnerships, associations, companies, corporations or entities ("Persons") who own, lease, operate and/or maintain overhead lines and wires, poles and/or related overhead facilities equipment located along, across, over and/or adjacent to Telegraph, Telegraph intersections and to private property adjacent to Telegraph, are hereby directed and ordered to begin immediately to relocate underground all of their overhead lines and wires and remove all poles and related overhead facilities equipment at their sole cost and expense and at no cost or expense to the City. In complying with this paragraph, the Companies, Agencies and Persons shall also fully comply with the Taylor Utilities and Telecommunications Right-of-Way Regulatory Ordinance (#97-305).[1]

D. THE HISTORY OF THE CITY OF TAYLOR'S ORDINANCES AND INVOLVEMENT IN THE TELEGRAPH ROAD IMPROVEMENT PROJECT.

The City of Taylor covers twenty-four square miles, and has a population of approximately 68,000. Located within its physical borders are numerous commercial and industrial businesses. (Complaint, p 2, ¶4, Apx 2b). The City is literally halved by a major north-south divided boulevard, known as Telegraph Road ("Telegraph"), which runs the entire length of the City from south of Pennsylvania Road to north of Van Born Road with three to four lanes in each direction. Telegraph is a very heavily traveled road accommodating approximately 70,000 vehicles daily with a posted speed of forty-five m.p.h. north of Goddard Road and fifty m.p.h. south of Goddard Road. (Complaint, p 2, ¶5, Apx 2b). In addition to its heavy volume of

[1]Edison's reference in the Court of Appeals (Defendant's Brief, p 3) to Taylor Ordinance No. 68-8, Article V, § 501, was wrong. That ordinance, passed in 1969, is found in Chapter 29 of the City Code ("Subdivision Regulations"). It does not control over Ordinance No. 00-344, which pertains specifically to the Telegraph Road Improvements. Indeed, § 9 of the latter enactment repeals "all ordinances or parts of ordinances in conflict herewith."

high speed daily traffic, Telegraph is also one of the major business/shopping districts in the City, with hundreds of businesses and commercial uses adjacent to and/or fronting northbound and southbound Telegraph. Typically, each business and commercial use has its own curb cuts and driveway for ingress and egress to Telegraph requiring vehicles to slow down on Telegraph to enter a business and accelerate onto Telegraph when leaving the business. As a result, the Telegraph corridor (northbound and southbound between Pennsylvania Road and I-94) is the most heavily congested business district in the City. (Complaint, pp 2-3, ¶6, Apx 2b).

Due to the heavy traffic volume, high speed, and vehicles entering and exiting Telegraph to businesses and commercial uses adjacent to and/or fronting Telegraph in the City, the Telegraph corridor also experiences one of the highest accident rates in the City. During the five years from 1995-2000, Telegraph annually averaged seven hundred vehicular accidents, some of which involved collisions with utility poles. (Complaint, p 3, ¶7, Apx 3b).

Edison conducts business within the City by providing electricity to thousands of residential, commercial, and industrial customers through a series of overhead and underground lines, poles, and related transmission and distribution facilities and equipment. (*Id.*, ¶8, Apx).[2] Edison provides electricity along the Telegraph corridor predominantly through scores of utility poles, overhead lines, and related facilities and equipment located on public and private property a few feet off of or crossing over Telegraph and intersecting roads. (*Id.*, p 4, ¶10, Apx 4b).

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[2]The agreement under which Edison originally obtained a franchise to operate within the City was entered into between Edison and the Township of Taylor. (Appellant's Appendix, pp 13a-16a). Section 6 of the agreement provided:

> Nothing in this grant shall be construed to alienate the title of the public in and to any street, highway, alley or public place or any portion thereof, neither shall anything herein be construed in any manner as a surrender by the TOWNSHIP OF TAYLOR of its legislative power with respect to the subject matter hereof, or with respect to any other matter whatsoever, nor as in any manner limiting the right of the said TOWNSHIP OF TAYLOR to regulate the use of any street, avenue, highway or public place within its jurisdiction.

Edison also leases space on its utility poles to and allows attachments by other utility and telecommunications companies conducting business in the City including SBC Ameritech ("Ameritech"), Comcast Cablevision of Taylor, Inc ("Comcast") and Wide Open West Michigan, LLC ("WOW") (hereinafter collectively "Edison lessees"). The Edison lessees provide telephone, internet, and cable television services to the businesses and residents of the City by attaching their own overhead lines and related facilities and equipment on the Edison poles. (*Id.*, ¶11, Apx 4b).

This scramble of overhead lines, utility poles, and related facilities and equipment along, adjacent, across, and over Telegraph and intersecting roads, among other things, increases congestion of this already heavily congested business district, increases automobile accidents along Telegraph by collision with Edison's poles, significantly reduces the aesthetic appeal of the Telegraph corridor, exacerbates electrical service interruptions, and otherwise infringes upon the public health, safety, and welfare, particularly and especially those of persons living in, conducting business in, and/or traversing through the City. (*Id.*, ¶12, Apx 4b).

Around the fall, 1999, the City, in cooperation and consultation with the Michigan Department of Transportation ("MDOT"), commenced the design of the major reconstruction and infrastructure improvement of northbound and southbound Telegraph in the City from just south of Eureka Road to Ecorse Road. This project called for, among other infrastructural improvements, new road pavement, new water mains, new sidewalks, new street lighting, new conduit for utilities, and median irrigation. The project also required the City to acquire through condemnation, or otherwise, land along Telegraph from private owners to allow the project improvements to go forward. (*Id.*, pp 4-5, ¶13, Apx 4b). This project reached the design and planning phase with construction commencing in February-March, 2001. (*Id.*, ¶14, Apx 5b). At

present, the underground relocation project is substantially complete. As part of the project, the City advanced the cost of the conduit. (*Id.*)

One significant portion of the project is the underground relocation of all Edison's and Edison lessee's electrical utility, cable television, telecommunication, traffic signal, and other overhead lines, wires, and related facilities and equipment, and the removal of overhead line poles and other related overhead equipment and facilities along Telegraph. (*Id.*, ¶15, Apx). On March 29, 2000, representatives of the City met with representatives of Edison and Edison lessees to discuss the project generally and the timing and cost of overhead line underground relocation particularly. (*Id.*, ¶16, Apx 5b). On March 30, 2000, the mayor wrote to representatives of Edison and of Edison lessees regarding the project (Complaint, ¶17, Apx 5b; Exhibit 1, Apx 15b-23b) stating the established rule that relocation costs must be borne by the utility in the context of the City performing a governmental function. The mayor also expressed a willingness to work with Edison and Edison lessees in this matter. (*Id.*)

On April 19, 2000, the City met with representatives of Edison to discuss issues related to the project, including the timing of Edison's submission of detailed design engineering for the utility relocation, cost estimate of relocation, and who would bear the cost of relocation. (Complaint, p 7, ¶18, Apx 7b). Edison represented that it would provide timely design engineering to the City by July 14, 2000 in order to allow the City to timely submit design engineering plans for grade inspection on the project to MDOT on August 14, 2000. (*Id.*) This understanding was confirmed in two written communications of May 1 and July 7, 2000 to Edison from the City's engineer. (Exhibits 2, 3, Apx 25b-27b). Representatives of Edison's lessees indicated a willingness to participate with the City in the cost of the underground relocation, the first option suggested in the mayor's letter of March 30, 2000. (Exhibit 1, Apx 15b-23b).

The City and Edison again met, on January 4, 2001, and agreed to defer further discussions on the issue of responsibility for the cost of the underground relocation of overhead lines until construction work had progressed further. (Complaint, p 12, ¶27, Apx 12b-13b). On May 22, 2002, the parties met yet again in an attempt to settle this matter as construction had progressed to the point where underground relocation of overhead lines was now ready to proceed. (*Id.*) The parties remained unable to resolve their differences on ultimate responsibility to pay for the relocation costs but agreed to allow the project to continue without delay and to resolve the dispute over liability for relocation costs. (*Id.*, pp 12-13, Apx 12b-13b). Edison refused to proceed with the underground relocation of overhead lines unless and until the City advanced the cost to Edison. (Exhibit 9, Apx 54b-55b). The City agreed that it would advance those costs without prejudice to and with a full reservation of rights to seek full reimbursement of advanced costs and a court ruling that Edison is to bear the cost of the underground relocation for itself and the Edison lessees, including but not limited to, the cost of conduit, manholes, cable, switching cabinets, cable installation, pulling of utility lines, and utility hook-ups. (Exhibit 10, Apx 57-59b). The City provided Edison and the Edison lessees with written notice to relocate as required by § 3 of the Telegraph Relocation Ordinance. (Exhibit 11, Apx 60b-63b).

The City commenced this action on June 25, 2002, by filing its complaint for declaratory judgment, noting the existence "at present" of "an actual and justiciable controversy between the parties," and seeking the Court's "declaration that Detroit Edison is obligated on behalf of itself and the Detroit Edison lessees to relocate and pay the entire cost of underground relocation of Overhead Lines along the northbound and southbound Telegraph corridor as part of the project." (Complaint, pp 13-14, ¶¶ 30-31, Apx 13b-14b).

SUMMARY OF THE ARGUMENT

A city's right to enact reasonable police power regulations with respect to structures placed within the right-of-way of city streets falls squarely within the protection for local governments that two constitutional conventions enshrined in draft constitutions that were subsequently ratified by the voters of Michigan on each occasion. Const 1908, art 8, § 28; Const 1963, art 7, § 29. Despite the arguments of some delegates that municipalities would use their authority over local streets to block utilities, or to force utilities to bury their lines, or to take other steps that would be problematic, strong language was adopted in 1908 and maintained against efforts to weaken it in 1963. See State of Michigan Constitutional Convention, 1907-1908 Official Report, pp 1049-1053, 1247-1248, 1403-1411; State of Michigan Constitutional Convention, 1961 Official Record, pp 3143-3147. Article 7, § 29 protects the City of Taylor's right to enact ordinances requiring a utility operating within the right-of-way of a city street to relocate its structures as long as the requirement falls within the sphere of the City's "reasonable control" of the streets.

Ordinance 00-344 is unquestionably a reasonable police power measure to address serious public safety, health, and welfare concerns of the City. Telegraph Road is the City's major thoroughfare and runs through a heavily congested business district. (City of Taylor Traffic Study, Apx 59a-113a). Approximately 70,000 vehicles per day use the roadway. (City of Taylor Traffic Study, Apx 59a-113a). Numerous accidents have taken place on Telegraph, including sixty-three involving contact with utility poles. (City of Taylor Traffic Study, Apx 59a-113a). In response to its legitimate concerns about public health and safety on the roadway, the City of Taylor enacted this ordinance requiring the relocation of utility structures underground as part of the reconstruction project of Telegraph. (Ordinance 00-344, Apx 45b-52b). The City sought to enhance traffic operational safety by requiring the removal of overhead lines, wires, and facilities in order to improve sight lines and visibility, and to eliminate vehicular

accident impacts on the poles, overhead lines, and other facilities equipment. (*Id.*) The regulation also sought to protect residents and persons traveling on the road from the danger associated with falling or downed power lines, wires, poles, and facilities equipment. (*Id.*)

Edison argued below and maintains in this Court that it is not obligated to bear its costs in complying with this police power regulation. In support of this argument, Edison suggests that the measure is invalid because it represents an effort to "shift the responsibility for underground replacement costs from the city to utilities." (Edison's Brief, pp 24-30). But this argument misapprehends the nature of regulatory police-power measures. The distinction traditionally used to allocate costs of utility structure relocation is based upon whether the requirement stems from the utility's obligation to comply with a governmental regulatory action or whether it results from some proprietary or non-governmental conduct. This distinction stems from the fundamental notion that regulated persons or corporations (including utilities) are responsible for any costs they incur in complying with a valid enactment. See e.g., *Queenside Hills Realty Co v Saxl*, 328 US 80l; 66 S Ct 850; 90 L Ed 1096 (1946); *Detroit v Michigan Bell Telephone Co*, 374 Mich 543; 132 NW2d 660 (1965); *New Orleans Gaslight Co v Drainage Comm of New Orleans*, 197 US 453; 25 S Ct 471; 49 L Ed 831 (1905). Although Edison attacks the governmental/proprietary distinction as unworkable, it offers no basis for concluding that the City of Taylor's ordinance is anything other than a regulatory police power measure. As a result, Edison is responsible for its own costs for coming into compliance with the requirement that all utility structures on Telegraph Road be placed underground due to changing public health, safety, and welfare needs.

Edison tries to circumvent its responsibility for bearing its own costs of compliance by suggesting that the City's right to regulate must yield to matters of statewide concern, that the MPSC has authority over rates for utilities and compliance with the regulation will increase utility costs, which may in turn have an effect on rates, and that the City's right to regulate has

been preempted by the statutes establishing the MPSC and defining its jurisdiction. (Edison's Brief, pp 16-23, 31-35). Edison also asserts that the regulation amounts to a constitutional violation of its due process rights or contract rights or a taking of its property. (Edison's Brief, pp 28-30).

But in none of these arguments does Edison give content to article 7, § 29 which preserves an arena within which local governments are entitled to control their streets. Although Edison contends that the MPSC has broad authority, Edison fails to explain why this authority is not limited here by the phrase creating an exception to MPSC authority as "otherwise provided by law." This phrase should be read to incorporate the limits of article 7, § 29 into the MPSC's sphere of authority. Edison offers a reading that measures the scope of a city's "reasonable control" without taking into account that the language, history, and purpose of art 7, § 29 was to protect cities from legislative overreaching with regard to their reasonable control of the streets. Edison virtually reads this constitutional protection out of the constitution. The matter of statewide concern, which Edison suggests is preemptive, is the state's interest in setting utility rates. But Edison fails to come to grips with the undisputed fact that the ordinance does not set rates. It merely requires compliance by the regulated entities at their own cost. This does not take the ordinance outside the sphere of protected conduct or render it invalid on other grounds.

Edison spends little or no time attacking the reasonableness of the City's ordinance or attempting to undercut the police power basis for the City's enactment. But the logic of Edison's argument, if accepted by this Court, has no stopping point. Under Edison's theory, any local police power ordinance that increases a utility's expenses would amount to an enactment to be struck down as inconsistent with MPSC jurisdiction and contrary to "statewide concern." Edison offers no authority in support of this approach. It is particularly troublesome here because the City's regulation falls not only well within its constitutionally-protected home rule, Const 1963,

art 7, § 24, but within its doubly-protected right to control the streets within its borders. Const 1963, art 7, § 29.

Edison's takings, due process, and contract-impairment theories are also foreclosed by Michigan and federal constitutional law. The City has not taken Edison's franchise rights. Edison continues to operate as a franchisee within the City. It has merely been required to relocate some utility structures along Telegraph. Since its franchise rights cannot be deemed to divest the City of its police powers, Edison's contract claim cannot survive. The City has not attempted to take Edison's franchise or its physical property, thus no constitutional claim exists.

The City of Taylor enacted a reasonable police power ordinance to protect the public health, safety, and welfare. Edison is obligated to comply with the ordinance, and is responsible for its own costs in doing so. Therefore, the judgment of the lower courts should be affirmed.

STANDARD OF REVIEW

Constitutional and statutory issues are subject to de novo review. *County of Wayne v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004); *Cox v Flint Board of Hospital Managers*, 467 Mich 1, 16; 651 NW2d 356 (2002). Questions of law in general are reviewed de novo. *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004). A trial court's ruling to either grant or deny a motion for summary disposition is also reviewed de novo. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A circuit court's decision concerning whether to defer to an agency's primary jurisdiction is reviewed to determine whether the case could be more appropriately resolved by an administrative agency because the dispute requires the "resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 206; 631 NW2d 733 (2001).

ARGUMENT I

CONST 1963, ART 7, § 29 PROTECTS THE CITY OF TAYLOR'S RIGHT TO ENACT ORDINANCES REQUIRING A UTILITY OPERATING WITHIN A CITY RIGHT-OF-WAY TO RELOCATE ITS UTILITY STRUCTURES.

A. THE TEXT, BACKGROUND, AND PURPOSE OF THE PREDECESSOR TO ARTICLE 7, § 29 SUPPORTS A READING OF THE CURRENT PROVISION THAT PROTECTS A CITY'S BROAD AUTHORITY TO REGULATE REGARDING STREETS WITHIN ITS JURISDICTION.

The current constitutional language can be traced to article 8, § 28 of the 1908 Constitution. Article 8, § 28 provided:

> Sec. 28. No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

This 1908 provision was new; no similar provision had been contained in the 1850 Constitution. State of Michigan Constitutional Convention, 1907-1908 Official Report, pp xxviii-xxix.

Article 8, § 28 was intended to protect local governments from state legislative attempts to deprive them of the control of local highways, streets, and public places. This is reflected in the debate surrounding adoption of the provision during the 1908 constitutional convention. One delegate observed that the provision was "plainly... a prohibition upon the legislature and not a matter of legislation." *Id.* 1247, Apx 276b. He explained that "[I]t would prevent the legislature by a general act from granting away to any utility the control which the City should have over its own streets." *Id.* The provision would "prevent the legislature from delegating that control to a commission." *Id.* The delegate read the provision to recognize a city's right to control of its streets, which were paid for by abutting property owners and were maintained by the city or the

village. *Id.* The delegate emphasized that "the right of the city or the village to the control of those streets should be unquestioned and should be protected in the Constitution." *Id.*

Those opposed to the proposed language argued that it would allow a city (or other local unit of government) to veto the running of utility lines through the city. State of Michigan Constitutional Convention, 1907-1908 Official Report, pp 1049-1050, Apx 270b-271b. Delegates argued against the language because it would empower each city to prevent the placement of telephone lines within a city causing a monopoly in already existing utilities. *Id.*[3]

Delegates supporting the provision emphasized that the utilities ought not decide for themselves the parameters of their use of city streets for a private profit-making business. Delegates supporting the provision defended the local governments. One delegate urged the convention to leave the decision "to the good judgment of the cities and villages themselves whether or not they want a business of this kind carried on when they already have perhaps one or two there, and make an additional burden to their citizens in the matter of an additional telephone." *Id.* Urging the convention not to presume that a city would be unreasonable in its decisions, one delegate argued:

> Now the gentleman from St. Joseph [Mr. Stewart] seems to think that a township, city or village might be unreasonable in ordering a company to put their poles and wires at inconvenient places. If a township, city or village cannot decide this matter, I want to ask the gentleman who is to decide it? Is the company to be allowed to place them where it pleases? I think not, and it is not to be presumed for a moment that the electors of a township, city or village would be unreasonable, and undertake to enforce unreasonable regulations against any company desiring to put up poles and wires for the telephone company.

Id. at 1050, Apx 271b. One delegate reminded the convention that the decision of where to place utility structures should not be left to the utility. *Id.* After these debates, the constitutional convention adopted the provision with strong language to protect the rights of local governments

[3]These arguments are strikingly familiar to the arguments presented in the briefs of amici today. They sound a refrain that participants in the debates over adoption of article 8, § 28 ultimately rejected by adopting this new provision.

in the use of their highways, streets, and alleys, including their right to control the placement of utility lines.

The convention delegates rejected arguments that the constitutional provision would allow a single township to "block" a utility's network or could "compel a telephone company to put its wires underground, if it saw fit," which would "be a prohibition." *Id.* at 1052, Apx 274b. They embraced language intended to ensure that a local government had the "unquestioned right" to "control its own streets and determine under what regulations, poles or wires, or pipes or tracks should be put upon those streets." *Id.* at 1247, Apx 276b.

Lending further support to an interpretation of the language as being strongly protective of local governments' rights, the convention delegates rejected a proposal that might have been read to weaken the protection for local control of right-of-ways. The proposed amendment would have added the words "subject to the Constitution and general laws of this State," to the beginning of the sentence. Delegate Hawkins sharply criticized the proposed amendment, observing:

> It opens the door to the same damnable iniquity that we are struggling to get away from, and that is the statute of 1895. At the present time, the villages of this state and the cities have the general right to control of their streets, but this statute of 1895 as passed by the state legislature is maintained to rob them of every particular control that they have. I therefore am most strenuously opposed to introducing this particular clause. I believe that there is a proper solution to this matter, but it does not lie in providing that the rights of the villages and cities shall be subject to legislative enactment. That is what we wish to escape, and that is the very idea of putting this proposal in the shape it is. I believe that it can be modified, and I think I know how it can be, so that it will do justice to the people of the state at large, and the corporations desiring rights-of-way, but it is not be emasculating the entire proposition and interjecting legislative control under this last sentence.

Id. at 1405, Apx 280b. The proposed amendment to weaken the language was subsequently withdrawn so that Delegate Hawkins could move a substitute amendment to add the word "reasonable" to describe the "control" reserved to cities. This substitute amendment was

eventually adopted by the convention delegates. The word "reasonable" was used to define the outer limit of a city's right to control its streets. When regulatory efforts to control the local streets are reasonable, they fall within the constitutionally-protected sphere of activity.

Early decisions read article 8, § 28 to protect a city's right to reasonable control of its streets against state legislative interference. In *People v McGraw*, 184 Mich 233, 150 NW 836 (1915), for example, the Court considered a challenge to a local ordinance enacted to require a vehicle driver to keep the front and rear lights of his vehicle turned on when the city streetlights were lit. The driver argued that the city lacked power to enact the ordinance because a state statute had been enacted, which barred local authorities from exercising control of their highways with reference to motor vehicles. 184 Mich at 235-237. The Court concluded from comments during the convention debates that "it was not the intention of the framers of the Constitution to deprive absolutely the state itself of control over its highways and bridges in the cities, villages, and townships." *Id.* at 237. But article 8, § 28 placed public utilities "under control of the local authorities, and the local authorities may control within reason the use of their streets for any purposes whatsoever not inconsistent with the state law." *Id.* at 238.

Contrary to Edison's reading of this language, the Court has never limited the constitutional provision's protection of local control to local regulations that are consistent with state legislation. Otherwise, the Court would not have struck down a portion of the state statute at issue in *McGraw*. There, the Court determined that the statute "clearly attempt[ed] to take away from cities all control of their highways with reference to the use thereof by motor vehicles." Based on this impermissible attempt to legislatively-override the local governments' constitutionally-protected sphere of action, the Court held that "such parts of said section which forbid the cities from exercising reasonable control of their highways as herein defined must be held to be unconstitutional and void." *Id.* at 238-239. The Court explained that a municipality's

reasonable control meant that it could "recognize local and peculiar conditions, and to pass ordinances, regulating traffic on its streets, which do not contravene state laws." *Id.*

In deciding a utility company's challenge to a local ordinance in *Kalamazoo v Titus*, 208 Mich 252; 175 NW 480 (1919), the Court described the meaning of reasonable control of the streets as a "rather plenary grant" of power. The Court distinguished between the power to regulate the rates of a utility, which was not conferred on municipalities, and the "rather plenary grant of power to provide for the use, regulation, and control of streets," which was. 208 Mich at 266. The fixing of a compulsory price for gas "cannot be reasonably referred to use, regulation, or control of streets." *Id.* The city therefore lacked the power to enact an ordinance fixing the price for electric power. *Id.* See also *Detroit, Wyandotte & Trenton Transit Co v Detroit*, 260 Mich 124; 244 NW 424 (1932) (recognizing that state legislative authority cannot infringe upon constitutional right of city to reasonable control of its streets and striking down regulation completely barring all jitneys in a city's streets but recognizing that reasonable regulation of methods of jitney operation would be permissible).

In another early decision, the Court held that the "only restriction" on the city's constitutional authority over the streets was that its enactments be reasonable. *Melconian v Grand Rapids*, 218 Mich 397, 405; 188 NW 521 (1922). According to that Court, article 8, § 28 vested power to control the use of the streets in a city, which was beyond the control of the legislature. Those plaintiffs sought to enjoin enforcement of a city ordinance regulating the operation of motor vehicles for hire within the city and requiring those operating such vehicles to obtain a license. Observing that the subject matter of the ordinance was "the use of the public streets," the Court concluded that article 8, § 28 of the Constitution applied. The Court struck down penal portions of the ordinance because local governments at that time had no delegated power to enact criminal penalties. But the Court upheld the licensure provisions emphasizing that where "the subject-matter sought to be controlled is one to which an applicant has a

permissive right only, many courts have gone far in holding that the validity of the provisions, under which such a right may be attained, cannot be questioned." *Id.* at 406. The plaintiffs sought to use the streets "as a place in which to carry on a private business for personal gain," and thus were not entitled to use the public property as a matter of right; it was a privilege. *Id.* at 408-409.

The text of article 8, § 28 preserves to cities the right to reasonable control of their streets. The "right" of "all cities" and other specified local governments "to the reasonable control of their streets" was "reserved." *Id.* A right to control the streets encompasses a right to determine what structures may be placed within the streets and to require utilities operating within the public streets to relocate their structures as changing public needs dictate. The debates leading up to the adoption of article 8, § 28 reveal its purpose, which was to prevent the legislature from depriving local governments of their control over the right-of-ways within their borders, particularly with respect to utilities, which were seeking to use them for private business. The text confers reasonable control of the streets onto local governments. Early decisional authority confirms this interpretation and makes clear that a city's reasonable control should withstand legislative efforts to override it.

B. THE TEXT, BACKGROUND, AND PURPOSE OF ARTICLE 7, § 29 DEMONSTRATES THAT THE FRAMERS INTENDED TO PROTECT A CITY'S RIGHT TO REASONABLE CONTROL OF ITS STREETS FROM LEGISLATIVE INTERFERENCE OF ALL KINDS.

The Michigan Constitution confers upon local governments the right to reasonable control of the highways, streets, alleys or other public places of the local government. Const 1963, art 7, § 29. Under article 7, § 29 of the current Michigan Constitution:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracts, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local

> business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Article 7, § 29 requires a public utility to obtain consent to use the highways, streets, alleys, or other public places of a city. *Id.* It also mandates that a public utility obtain a franchise from the city before operating within the city. *Id.* And "except as otherwise provided in this constitution," it grants cities the right "to reasonable control over their highways, streets, alleys and public places." *Id.* To understand more specifically what powers the constitution has conferred upon cities, it is helpful to examine the constitutional origins of the provision.

Article 7, § 29 is identical to the 1908 provision with the addition of the phrase "[e]xcept as otherwise provided in this constitution" before the sentence that confers on cities a right to reasonable control of their streets, alleys, and public places. Const 1963, art 7, § 29. The constitutional debates surrounding the minor changes in the provision confirm that the framers intended to preserve the long-recognized power of cities to reasonable control of their streets. Two delegates at the convention sought to add the words "Subject to this constitution and the general laws of the state...." before the remainder of the sentence reserving reasonable control to local units of government. The proposal met with great skepticism for fear that it would be read to effectively allow the state legislature to deprive local units of their reserved power. During the course of discussion, the following exchange occurred:

> MR. GOVER: Mr. Elliott, doesn't this changing, this new amendment, give the power to grant franchises to the State Highway Department if they want it, doing away with all the local governments having any power to grant that franchise?
>
> MR. A. G. ELLIOTT: No.
>
> MR. GOVER: It looks to me like that's the way it's worded in there, by changing the way you have there, the "governing body" there, taking that out, so that the local units of government don't have the power anymore to do it, but the State Highway Department or someplace in the State of Michigan, down in Lansing, could grant all power to override that.

MR. A. G. ELLIOTT: The answer is, no.

State of Michigan Constitutional Convention, 1961 Official Record, at 3145, Apx 267b. The fear of state legislative action prompted the convention delegates to reject this language, leaving only the phrase "Except as otherwise provided in this constitution" before the remainder of the language protecting "the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places." The framers rejected the proposed change in language that might have been read to transfer local control of the streets from cities to the state.

Michigan courts have repeatedly held that this constitutional power entitles local governments to broad regulatory authority over the roadways within their borders under their police powers. In *Detroit v Michigan Bell Telephone Co*, 374 Mich 543; 132 NW2d 660 (1965), for example, the City, as part of a redevelopment project, vacated certain dedicated streets and alleys in which private utilities had previously been granted the right to maintain their facilities. The City directed that the utilities move their facilities to other streets and alleys without compensation. Both Michigan Bell and Edison argued that the City had acted unreasonably in the exercise of the police power. The Supreme Court rejected the utilities' argument. Though noting that "upon acquisition and exercise by a utility, a franchise becomes a vested property right, in the nature of a contractual right protected by Federal and State constitutional guaranty," the Court also stated:

> The rights acquired are dependent upon the nature of the original grant and any reservations therein. Even when acquired and exercised these rights are subordinate to the rights of the municipality in the reasonable exercise of the police power as delegated to it by the sovereignty -- the State. Assuming the city here had contracted away the superior supervisory control, the action would have been a nullity. Municipalities cannot contract away their governmental obligations. The right of control over the utilities in the exercise of their franchises, contract, or vested rights, whatever name given them, abides in the city.

374 Mich at 552. A city's right of "reasonable control" of highways within its city limits, reserved by art 7, § 29, is among those municipal powers which "shall be liberally construed in [its] favor," and is deemed "by law [to] include" additional powers "fairly implied and not prohibited by this Constitution." *Id.*, Const 1963, art 7, § 34. This right of a City's reasonable control of its streets was embedded within the constitution in order to assure that future legislatures could not limit or deprive the cities of control by transferring their power to the state or to a commission. Absent a constitutional amendment, this right of reasonable control is properly enforced by the courts.

C. A Provision In The Michigan Constitution Is Interpreted By Applying The Rule Of Common Reasoning In Light Of The Text, The Circumstances Surrounding Its Adoption, And The Purpose It Was Designed To Accomplish.

Michigan courts interpret constitutional provisions by determining "the text's original meaning to the ratifiers, the people, at the time of ratification." *Id.* at 468; 684 NW2d 765. This is accomplished by considering the "term's plain meaning at the time of ratification." *Id.* at 468-469; 684 NW2d 765. See also *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367, 375; 663 NW2d 436 (2003). This is sometimes called the rule of common understanding. *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004); *Federated Publications, Inc v Michigan State University Board of Trustees*, 460 Mich 75, 84; 594 NW2d 491 (1999). This Court has embraced Justice Cooley's explanation of this analytical framework:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it.

Traverse City School Dist v Attorney General, 384 Mich 390, 405; 185 NW2d 9 (1971) citing Cooley, Constitutional Limitations (6th ed), p 81. In discerning a provision's meaning at the time of ratification, this Court has taught that it is appropriate to consider "the circumstances

surrounding the adoption of the provision and the purpose it is designed to accomplish." *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998).

If the text includes a technical, legal term, then the court is to rely on the understanding of the term as those sophisticated in the law understood the term at the time of the constitutional drafting and ratification. *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367, 375; 663 NW2d 436 (2003). See also *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 222; 634 NW2d 692 (2001). In *Hathcock*, this Court looked to Justice Cooley's explanation for technical terms of art:

> We cannot understand these provisions unless we understand their history, and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. When the law speaks of an ex post facto law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to employ language of a more popular character to designate it. The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights.

471 Mich at 469 citing 1 Cooley, Constitutional Limitations (8th ed), pp 130-133. See also *In re Payne*, 444 Mich 679, 707 n 6; 514 NW2d 121 (1994) (RILEY, J., concurring in part and dissenting in part) (quoting a portion of this passage). For example, the phrase "reasonable control" of the streets from Const 1963, art 7, § 29 can be understood using the rule of common understanding to examine how it was understood by the framers and ratifiers, the circumstances surrounding its adoption, and the purpose for which it was designed.

These interpretative guidelines support the position that, at a minimum, the reasonable control reserved to cities under article 7, § 29 protects the City's right to enact and to enforce an ordinance requiring a utility operating as a licensee within the City (by virtue of a franchise or otherwise) to relocate its utility structures underground as part of a road reconstruction project in a heavily congested business district in order to further the public health, safety, and welfare.

D. THE CITY OF TAYLOR'S ORDINANCE 00-344 FALLS SQUARELY WITHIN THE SPHERE OF CONSTITUTIONALLY-PROTECTED LOCAL CONTROL.

The City enacted Ordinance No. 00-344 as part of the major reconstruction and infrastructure improvement of Telegraph Road. The project included new road pavement, water mains, sidewalks, street lighting, conduits for utilities and median irrigation, at major expense to the City and other governmental contributors. As part of this process, the City determined that it was a "necessary public improvement to relocate underground all overhead electric utility, cable television, telecommunication and other lines and wires currently running along, across, adjacent to and/or over Telegraph." (Telegraph Relocation Ordinance, Apx 45b-52b). During the performance of this project, it was determined that the existing "scramble of overhead lines, utility poles and related facilities and equipment along, adjacent, across and over Telegraph and intersecting roads" be appropriately alleviated. (Complaint, p 4, ¶12, Apx 4b). The ordinance identified numerous governmental functions and purposes for its requirement that lines and utility structures be relocated, including to relieve the "utility, transportation and infrastructural burden on the Telegraph corridor," which is a "heavily-congested business district" within the City. (Telegraph Relocation Ordinance, Apx 45b-52b). The ordinance enhanced traffic operational safety, enhanced business development along Telegraph, and improved the aesthetic environment. (*Id.*)[4] The City's enactment of its ordinance, which constituted the reasonable performance of a non-proprietary function, brings this case within the general rule, and of local control rather than any of its exceptions.

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[4] Although Edison repeatedly refers to the ordinances purposes as being "beautification" project, (Edison's Brief, p 3) or as being based on "aesthetic concerns" (Edison's Brief, p 27), review of the ordinance and the record below makes clear that this was only an aspect of the City's concern, and not the most important one. Edison entirely ignores the record evidence showing that its utility structures were involved in numerous accidents along Telegraph Road. In any event, as the Court of Appeals observed, Michigan courts have recognized a legitimate government interest in the aesthetic concerns of a municipality regarding its community appearance. (Court of Appeals opinion, p 4, Apx 259b).

The lower courts upheld the City's ordinance as constitutionally-valid and rejected Edison's effort to strike it down as exceeding the City's right to reasonable control over its public roads and rights-of-way. Edison challenges this outcome but its position on the scope of constitutionally-protected city powers is not entirely clear. Although it seeks reversal of the judgment against it, Edison fails to clarify for this Court its view of the scope of a city's constitutional right to reasonable control of its streets and whether this protects a city's right to regulate the placement of utility lines and structures within a public street. Edison offers the Court no reading of the constitutional provision whatsoever, except to say that the Court should read the two sentences of article 7, § 29 by separating the words into three clauses, and looking at each clause separately. (Edison's Brief, pp 9-10).

This proposed approach violates the cardinal principle that words in a constitutional provision or statute must be read together to harmonize the meaning and to give effect to the whole. *Cain v Waste Management, Inc*, 472 Mich 236; 697 NW2d 130 (2005).[5] Article 7, § 29 contains two sentences, which govern the relationship between a city and a utility with respect to the latter's transaction of business and placement of structures within that city.[6] The first sentence bars a utility from transacting local business or using the public streets, highways,

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[5]Edison's approach also undermines the analytical framework that courts in Michigan have used to address the allocation of costs for relocating utility structures as local needs regarding the streets and highways change. See *Detroit Edison v Detroit*, 332 Mich 348; 51 NW2d 245 (1952). This issue is further discussed in connection with the City's discussion of argument two, relating to Edison's obligation to bear its own costs for compliance with government police power regulations.

[6]No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government. Const 1963, art 7, § 29.

Overhead Lines along the northbound and southbound Telegraph corridor as part of the project." (Complaint, pp 13-14, ¶¶ 30-31, Apx 13b).

On cross-motions for summary disposition, the circuit court held in the City's favor. (Defendant's Exhibit 6, Apx 33b; Opinion Denying Defendant's Motion for Summary and Granting Plaintiff's Motion for Summary, 11/25/02, Apx 146b). The circuit court concluded that the case did not fall within the MPSC's primary jurisdiction because this is an instance in which the City's constitutional authority applies. In other words, the case is within the exception to MPSC jurisdiction for those areas "otherwise restricted by law." MCLA 460.6, citing Const 1963, art 7, § 29. (Defendant's Exhibit 6, Apx 33b; Opinion, 11/25/02, pp 8-9, Apx 153b-154b). The circuit court discussed a number of instances in which Michigan courts have concluded that so long as the City is exercising a governmental function, "the utility must bear the relocation costs." (*Id.*, p 9, Apx 154b).

In entering its order granting the City's cross-summary disposition motion, the circuit court set forth two mandates: (1) Edison payments for expenses previously incurred by the City, in the amount of $2,588,166.75; and (2) Edison comply with the City's power line relocation Ordinance No. 00-344. (Order, 6/2/03, Apx 207b). The circuit court entered specific factual findings on the sorts of relief required by the earlier legal ruling.

In denying reconsideration, the circuit court reiterated this point:

> Edison argues that we should not be even deciding the issue before us, that the proper forum is the MPSC itself pursuant to the doctrine of primary jurisdiction. However, the instant matter is not one of regulatory expertise but of statutory interpretation, an interpretation delimiting the agency's powers. It has long been a precept of administrative law that an agency should not decide the limits of its own power. See *Soc. Sec. Bd. v Nierotko*, 327 US 358, 369 (1946).

The circuit court further observed that the right of the public utility to use public streets "is subject to the right of local government to require the utility to relocate its lines and facilities at its own expense when made necessary by considerations of public health and welfare" (Opinion

This Court rejected the utilities' argument. The Court noted that "upon acquisition and exercise by a utility, a franchise becomes a vested property right, in the nature of a contractual right protected by Federal and State constitutional guaranty." But the Court nevertheless explained that a franchisee's rights are subordinate to municipal police power regulations:

> The rights acquired are dependent upon the nature of the original grant and any reservations therein. Even when acquired and exercised these rights are subordinate to the rights of the municipality in the reasonable exercise of the police power as delegated to it by the sovereignty—the State. Assuming the city here had contracted away the superior supervisory control, the action would have been a nullity. Municipalities cannot contract away their governmental obligations. The right of control over the utilities in the exercise of their franchises, contract, or vested rights, whatever name given them, abides in the city.

374 Mich at 552. The Court reiterated the traditional rule that a city's decision to consent to a utility's request to transact business within the city or to place its structures in the streets does not abrogate the city's future exercise of its police powers.[7]

In reliance on decisional authority, Edison reads the constitutional provision to be "limited to matters of local concern," and argues that it "must yield to state control over statewide interests." (Edison's Brief, pp x, 14). Although Edison reads article 7, § 29 to

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[7]Edison does not argue, nor could it, that a Michigan home-rule city lacks authority to enact a reasonable regulation governing structures within its streets. See Const 1963, art 7, § 34; MCL 117.4(h). Section 4-h authorizes a city to provide in its charter:

> (1) Public ways. For the use, regulation, improvement and control of the surface of its streets, alleys and public ways, and of the space above and beneath them;
>
> (2) Public ways and places, use by public utility. For the use, by others than the owner, of property located in streets, alleys and public places, in the operation of a public utility, upon the payment of a reasonable compensation to the owners thereof;
>
> (3) Street and alley plan. For a plan of streets and alleys within and for a distance of not more than 3 miles beyond its limits;

Nor does Edison suggest that the City's charter lacks sufficient authority to enact such regulations. See City of Taylor Charter, Chapter XVIII. Instead, Edison limits its lack-of-authority argument to the contention that the City cannot require Edison to bear the costs of complying with the regulations. That aspect of Edison's argument will be dealt with in the next section of this brief.

empower cities to regulate only with respect to matters of "local concern," the phrase has no grounding in the constitutional text. The framers placed a statement in the constitution to protect the city's rights from legislative interference. Yet, Edison suggests that the scope of a city's right to control its streets rests within the legislature's discretion and not on the parameters of any constitutional limitation on the legislature's power. Edison cites no authority for the proposition that a city's reasonable control of its streets does not encompass the right to regulate placement of utility structures within the street and to insist that the structures be relocated when required by public necessity. Edison's approach violates the constitutional principle that rights and obligations enshrined within the constitutional text are preeminent.

A city's right to enact regulations governing the placement of utility structures within the right-of-way of a city street or highway falls well within the sphere of a city's right to control its streets. The City of Taylor's ordinance was limited to provisions dealing with the utility's use of the right-of-way in a heavily-congested business district. This reading of a city's right of reasonable control of its streets is consistent with the constitutional text and longstanding precedent. As a result, the City of Taylor's ordinance requiring a utility to relocate structures in a manner demanded by the public health, safety, and welfare is constitutionally-protected. See e.g., *McGraw*, *supra*; *Melconian*, *supra*.

Edison repeatedly offers conclusory statements about MPSC jurisdiction and its "broad statewide authority." Edison fails to reconcile that authority with the constitutional limitation contained in both the 1908 and the 1963 Constitutions or to specify where the cities reserved right to control of their streets protects against that authority. Edison does not squarely state whether it believes that the MPSC can, by regulation or by tariff, deprive a city of its control over the use of its streets, and if so, under what circumstances. But the thrust of its argument is that the boundaries of a city's constitutionally-protected sphere of control depends on the

decisions of the legislature or its statutorily-created administrative body, the MPSC. This cannot be.

Edison does not explain how its reading of the MPSC's jurisdiction and powers can be squared with the constitutional text. Edison simply assumes that, if Edison or the MPSC claims that a matter pertaining to use of the right-of-way is dealt with in the course of the MPSC's regulation of public utility rates, terms, and conditions of service, then it necessarily follows that the city is not entitled to regulate on that subject. Acceptance of Edison's broad assertions will render article 7, § 29 nugatory since the protection for local governments against legislative overreaching will become completely dependent on the decisions of the very body that was intended to be constrained. Every word, clause, and sentence in a provision is presumed to be intentional, so "we should take care to avoid a construction that renders any part of the statute [or constitutional provision] surplusage or nugatory." *Pohutski v Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002). Thus, Edison's view undermines the very constitutional protection that the ratifiers of the Michigan constitution explicitly intended to provide for cities.

Edison tries to buttress its argument by pointing to the several statutes dealing with the interplay between utility operations and municipal control and consent. According to Edison, 1909 Public Act 106, MCL 460.551 *et seq*, (enacted the year after the 1908 Constitution was adopted) granted utilities the right to use streets to transmit and supply electricity, "with municipal consent, and reserving a municipality's 'reasonable control' to matters of 'mere local concern'." (Edison's Brief quoting MCL 460.553 and also citing MCL 247.183[1]). Contrary to Edison's argument, the statute does not reflect a legislative effort to restrict municipal powers over utility use of right-of-ways. To the contrary, the statute reflects the legislature's effort to respect the constitutionally-mandated right of a city to control the use of its streets. MCL 460.553 provides:

> Any person, firm or corporation engaged or organized to engage in any such business of transmitting and supplying electricity in 1 or more counties of this state shall, with the consent of the duly constituted city, village and township authorities of the cities, villages and townships in or through which it operates or may hereafter propose to operate, have the right to use the highways, streets, alleys and other public places of such cities, villages and townships: Provided, That in all cases each transmission line used shall have insulation and conductivity in accordance with its voltage. In case it has or procures a franchise from any city, village or township or a right to do business therein, it may transact a local business therein. Nothing herein contained shall be construed to impair any right possessed by any village or township to the reasonable control of its streets, alleys and public places in all matters of mere local concern.

It specifies that nothing within it "shall be construed to impair any right possessed by any village or township to the reasonable control of its streets, alleys and public places in all matters of local concern." *Id.* The last phrase is not a limit on otherwise valid regulatory authority of a city; it is merely a recognition that cities are empowered to enact regulations regarding their local affairs. This would certainly include regulating with respect to structures and conduct within a local city street. Likewise, MCL 247.183(1)'s requirement that utilities obtain the "consent of the governing body of the city ... through or along which lines are to be constructed and maintained" amounts to legislative recognition of cities' constitutionally-preserved sphere of local control.

Edison argues that, having "duly obtained consent," a utility has a perpetual right to maintain its utility structures precisely where they were placed. (Edison's Brief, p 17). According to Edison, the City's ordinance is objectionable because nothing in the Michigan Constitution or statutes "allows the City, after consenting to overhead electric lines, to later require that they be removed and replaced with underground facilities at Edison's expense." (Edison's Brief, p 17). Edison cites no authority for the proposition that, once a city has consented to utility structures within its streets, it is forever barred from requiring them to be removed or replaced at Edison's expense. Edison's lack-of-delegated-authority argument is also problematic because it was not raised or decided below. *People v Carines*, 460 Mich 750, 763-

764; 597 NW2d 130 (1999). Thus, it is particularly inappropriate for consideration for decision in a court of last resort.

Edison's argument is further weakened by its analysis of the MPSC powers. The MPSC can do only those things authorized by statute. *G&A Truck Line, Inc v Public Service Comm*, 337 Mich 300; 60 NW2d 285 (1953). It has no common law powers, but instead possesses only the limited authority that the Legislature has conferred upon it. *Consumers Power Co v Public Service Comm*, 460 Mich 148, 155; 596 NW2d 126 (1999). This Court has taught that the MPSC "is an administrative body created by statute and the warrant for the exercise of all its power and authority must be found in statutory enactments." *Union Carbide v Public Service Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988) (quoting *Sparta Foundry Co v Public Utilities Comm*, 275 Mich 562, 564; 267 NW 736 (1936)). The MPSC's authority must be conferred by clear and unmistakable statutory language. A doubtful power does not exist. *Mason Co Civil Research Council v Mason Co*, 343 Mich 313, 326-327; 72 NW2d 292 (1955). The Commission cannot expand its jurisdiction through its own acts or assumption of authority. *Ram Broadcasting of Michigan v Public Service Comm*, 113 Mich App 79, 92; 317 NW2d 295 (1982). MCL 460.6(1) sets forth the MPSC's powers:

> The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and *except as otherwise restricted by law*. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipeline companies; motor carriers; private wastewater treatment facilities; and all public transportation and communication agencies other than railroads and railroad companies. [Emphasis added.]

This provision vests the MPSC with the regulatory authority over utilities, but it is limited. The legislature explicitly limited the MPSC's authority by including the phrase "except as otherwise restricted by law." MCL 460.6(1).

Article 7, § 29 of the Michigan Constitution unquestionably constitutes "law." Thus, the MPSC's statutory authority ceases at the boundary of a city's constitutionally reserved power of "reasonable control" of its streets. Edison offers no analysis of this clause within MCL 460.6(1) can be reconciled with article 7, § 29. But the lower courts correctly harmonized these provisions by reading the MPSC's powers to be confined to its rate-making oversight and upholding the City's police power regulation to protect the public safety by requiring a utility to bury utility structures that had been involved in numerous accidents, and bear its own costs for complying with a valid police power measure. The MPSC is authorized to set rates and, in doing so, exercises authority over the terms and conditions under which the utility provides its services in exchange for payment of those rates. But the MPSC is not empowered to replace local governments in regulating the manner in which structures can be placed within the city streets to protect the public health, safety, and welfare.

Finally, even if this Court were to engraft a "local concern" limitation on to article 7, § 29, it would encompass the placement of utility structures within a local street, highway, or alley. Although this Court has limited a city's reasonable control to its territorial limits, *North Star Line v Grand Rapids*, 259 Mich 654, 664; 244 NW 192 (1932), and held that a city may not exercise rate making powers over public utilities, *City of Niles v Michigan Gas & Electric Co*, 273 Mich 255, 264; 262 NW 900 (1935); *Dooley v Detroit*, 370 Mich 194; 121 NW2d 724 (1963), it has recognized that there is no natural or inherent right to use streets of a municipality as a place of business. *Fostini v Grand Rapids*, 358 Mich 36; 81 NW2d 393 (1957). The Court has acknowledged that a city may permissibly regulate the operations of cabs and jitneys within its borders, *Melconian v Grand Rapids*, 218 Mich 397; 188 NW 521 (1922), or establish a

system of parking meters on public streets, *Bowers v Muskegon*, 305 Mich 676; 9 NW2d 889 (1943), or require a utility to bear the expense of removal and relocation of electric poles in order to facilitate installation of a sewer. *Detroit Edison v Detroit*, 332 Mich 348; 51 NW 245 (1952). Edison has pointed to no authority to support the proposition that the placement of utility structures within a public right-of-way in a city falls outside the purview of a city's right to control of its highways, streets, alleys, and public places.

The better reading of "local concern" is that it imports the limits of a city's valid regulatory authority into its enactments regarding utility structures within a city right-of-way. In other words, just as a city's authority to regulate is always limited by the city's municipal or local concerns, so too is its authority to regulate within the right-of-way. But this limitation is not, as Edison urges, a narrow limit that would apply here. Edison's argument cannot be reconciled with the broad home rule powers of cities, and the indisputably local character of structures placed within a city street. Thus, the city's ordinance was properly upheld by the lower courts and the judgment should be affirmed.

ARGUMENT II

A CITY'S CONSTITUTIONALLY-PROTECTED RIGHT TO CONTROL ITS STREETS ALLOWS IT TO REQUIRE A UTILITY TO BEAR ITS COSTS FOR RELOCATING UTILITY EQUIPMENT AS PART OF A REASONABLE POLICE POWER MEASURE.

A. THOSE REGULATED BY A VALID POLICE POWER MEASURE MUST COMPLY WITH IT, INCLUDING BEARING THE COST OF DOING SO.

Michigan courts have repeatedly held, over a period of several decades, that in performing a governmental function (such as highway improvement), a municipality may require the provider of electricity to relocate its facilities at the utility's expense. The Court of Appeals' decision in this case properly recognized and applied this well-settled authority. On appeal before this Court, Edison advances the inflexible position that a city has "no" authority to "shift" costs to a utility absent express authority from the MPSC. (Edison's Brief, pp 24-28). Recognizing that its position is "contrary to the 'governmental/proprietary' distinction that the Court of Appeals" has applied in some cases, Edison nevertheless urges this Court to adopt a bold new approach. Edison's view, if adopted, would prohibit local governments from requiring compliance with police power regulations and requiring a regulated utility to bear the costs of its compliance, just as all regulated entities are responsible for the costs of complying with valid governmental regulations. In support of its position, Edison points to no Michigan decisional authority, offers no explanation of how its approach can be reconciled with article 7, § 29, and sets forth constitutional arguments relating to due process, the taking of property, and the impairment of contracts that are demonstrably inapplicable.

Michigan courts have recognized a city's constitutional, regulatory authority to require underground relocation of utility structures at the utility's expense. *Detroit Edison v Detroit*, 332 Mich 348; 51 NW2d 245 (1952) illustrates the reasoning that has traditionally been used to uphold such regulations. The Court upheld an ordinance imposing the expense of temporary

removal and replacement of Edison's electric poles in order to facilitate installation of a city sewer on Edison, and not the City of Detroit. After quoting directly from the predecessor provision to art 7, § 29 of the current Michigan Constitution, the Court stated:

> We conclude that within the limited terms of the dedications here involved the City's right of control over and user in the designated strips are the same as in areas dedicated to the City for streets or alleys. This being so, it follows that, as plaintiff concedes under such circumstances, the expense of removing and replacing plaintiff's utility poles must be borne by plaintiff. In consequence of our so holding, plaintiff obviously is not entitled to the injunctive relief sought.

332 Mich at 354-355. The Court recognized that the expense of removing and replacing utility poles is borne by the utility when it is required to move structures in compliance with valid governmental regulations.

In *Detroit Edison v SEMTA*, 161 Mich App 28; 410 NW2d 295 (1987), the Court of Appeals adopted as its own the opinion of Wayne Circuit Judge Arthur Bowman, concluding that Edison was responsible for the costs of relocation, removal, or abandonment of certain utility facilities in connection with the construction of the "People Mover." The Court stated:

> Relocation costs must be borne by the utility if necessitated by the City's discharge of a governmental function, whereas the expenses must be borne by the City if necessitated by its discharge of a proprietary function. Whether the utility has located its transmission facilities by virtue of an easement, franchise, plat, or other grant is irrelevant; all are treated identically.

161 Mich App 28, 30, quoting *Pontiac v Consumers Power Co*, 101 Mich App 450, 453; 300 NW2d 594 (1980) *lv den* 410 Mich 908; 302 NW2d 845 (1981). The *Detroit Edison* panel quoted from a United States Supreme Court decision for the rationale in support of allowing a municipality to exercise its police power and to assign the expenses to the utility:

> The police power, in so far as its exercise is essential to the health of a community, it has been held cannot be contracted away ... We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare.

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> In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is damnum abque injuria.

161 Mich App at 30-31, quoting *New Orleans Gaslight Co v Drainage Comm of New Orleans*, 197 US 453, 460-462; 25 S Ct 471; 49 L Ed 2d 831 (1905). The Court of Appeals emphasized the legislative recognition of this power in MCLA 247.185, which stood for the proposition that the utility company's rights "shall be subject to the paramount right of the public to use such public places, roads, bridges, and waters, and shall not interfere with other public uses thereof." *Detroit Edison*, 161 Mich App 28, 35-36. The court concluded:

> [T]he general rule in cases such as the one at bar is that a city need not pay a utility's relocation costs when such expenses are necessitated by the city's discharge of a governmental function. This rule emanates from the principle that a utility's use of public roads is subordinate to, and thus may not interfere with the municipality's use of the road[s] when discharging governmental functions.
>
> In the instant case the conclusion reached above indicates that the general rule applies. The conclusion that Defendant is statutorily empowered to exercise police power over public roads for the purpose of constructing mass transit facilities indicates that Defendant functionally acts as a municipality for purposes of applying the rule .... It follows therefore that the general rule does apply with the resultant finding that Defendant is under no duty to pay for Plaintiff's expenses necessitated by the construction.

161 Mich App 28, 37. According to the court, the city was constitutionally and statutorily empowered to exercise police power over public roads, including requiring utility structures to be relocated at the utility's expense.

In *Detroit v Michigan Bell Telephone Co*, 374 Mich 543; 132 NW2d 660 (1965), the City, as part of a redevelopment project, vacated certain dedicated streets and alleys in which private utilities had previously been granted the right to maintain their facilities. The City directed that the utilities move their facilities to other streets and alleys without compensation. Both Michigan Bell and Edison argued that the City had acted unreasonably in the exercise of

the police power. The Supreme Court rejected the utilities' argument. Though noting that "upon acquisition and exercise by a utility, a franchise becomes a vested property right, in the nature of a contractual right protected by Federal and State constitutional guaranty," the Court also stated:

> The rights acquired are dependent upon the nature of the original grant and any reservations therein. Even when acquired and exercised these rights are subordinate to the rights of the municipality in the reasonable exercise of the police power as delegated to it by the sovereignty—the State. Assuming the city here had contracted away the superior supervisory control, the action would have been a nullity. Municipalities cannot contract away their governmental obligations. The right of control over the utilities in the exercise of their franchises, contract, or vested rights, whatever name given them, abides in the city.

374 Mich at 552. Thus, "under the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever required to do so by state or local authorities. 12 E. McQuillin, The Law of Municipal Corporations (3d ed, 1970)." *Norfolk Redevelopment & Housing Authority v Chesapeake & Potomac Telephone Co*, 464 US 30, 35; 104 S Ct 304; 78 L Ed 2d 29, 34 (1983). Although utilities have sought to challenge this outcome on the basis that it impairs their contract rights under a franchise, courts have uniformly rejected such challenges because the city may not contract away its police powers. *Id.*

Under Michigan and other law, "relocation costs must be borne by the utility if necessitated by the City's discharge of a governmental function, while the expenses must be borne by the City if necessitated by its discharge of a proprietary function." *Detroit Edison v Detroit*, 208 Mich App 26, 30; 527 NW2d 9 (1994). See the City of Taylor Charter at § 18.2(a) (4/29/68), the City's "ROW Ordinance" (No. 97-305), § 2(e) and the City's Telegraph Relocation Ordinance (No. 00-344), § 2(d). *Monroe v Postal Telegraph Co*, 195 Mich 467; 162 NW 76 (1917) further illustrates the application of this rule to an ordinance regulating placement of utility structures within a public right-of-way. There, where the wires posed an interference

with traffic, the Court upheld the city's ordinance requiring the defendant to put its lines underground as a valid exercise of the police power.

In *City of Auburn v Qwest Communication*, 260 F3d 1160 (CA 9, 2001), the court faced the question whether a tariff of the State of Washington Utilities Commission "trumped" the common law and statutory rule that the utility company rather than the municipality bears the expense for facility relocation due to right-of-way improvements. The court concluded that the tariff effected no such alteration and did not require the municipality to shoulder relocation costs, citing the general rule followed in virtually every jurisdiction. *Id.* at 1167. The court explained that this requirement stems from the conditional nature of a utility's right to have facilities in the public right-of-way. *Id.* The conditional nature of Edison's right to have structures in the right-of-way along Telegraph is underscored by the language in its city franchise. Paragraph 6 explicitly recognizes that the franchise grant did not amount to a "surrender" of local government "legislative power" with respect to the streets, highways, alleys, and public places. (City of Taylor Franchise, ¶6, Apx 6a). Thus, Edison is obligated to comply with the City's reasonable police power measure.

In *US West Communications v City of Longmont*, 948 P2d 509 (Colo, 1997), the Supreme Court of Colorado, sitting en banc, concluded that an ordinance requiring owners and operators of existing overhead electric and communications facilities to relocate those facilities underground at their own cost was a reasonable exercise of the city's general police powers and its statutory power to regulate streets, sidewalks and utility poles. The court relied upon a provision of the Colorado State Constitution which is very similar to art 7, § 29 of the Michigan Constitution. 948 P2d 509, 520. The city had made "specific findings that the relocation of facilities furthered the health, safety, and welfare of [local] residents by improving the City's aesthetics, enhancing traffic safety, and better protecting [the City's] electric facilities." 948 P2d at 521. Thus, the ordinance was consistent with the municipality's "general police power to

regulate the health, safety, and welfare of its citizens," and that the city had "the right to compel a utility to relocate its facilities at its own costs, limited by the reasonable exercise of its police powers." *Id.*

Compliance with valid police powers regulations is required of those regulated; and they are responsible for bearing the costs. *Queenside Hills Realty Co v Saxl*, 328 US 80; 66 S Ct 850; 90 L Ed 1096 (1946) (many types of legislation diminish the value of regulated property but in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws); *Third & Catalina Associates v Phoenix*, 182 Ariz 203; 895 P2d 115 (1994) (City may legitimately exercise its police power, without being liable for taking, in order to protect its residents, and it is not unconstitutional to require money to be spent in compliance with the regulation). See also, *Detroit v Michigan Bell Telephone Co*, 374 Mich 543; 132 NW2d 660 (1965). Thus, Edison's effort to immunize itself from the reach of local police power regulations by virtue of its status as a franchisee should be resisted.

B. THE CITY OF TAYLOR'S ORDINANCE WAS A REASONABLE AND VALID POLICE POWER MEASURE TO PROTECT THE PUBLIC HEALTH, SAFETY, AND WELFARE.

Under this overwhelming body of authority, the circuit court and the Court of Appeals correctly ruled in favor of the City. Contrary to Edison's argument, more than a "beautification project" is at issue here. The City budgeted costs estimates of $32 million for the reconstruction of Telegraph Road and other infrastructure improvements including curbs, gutters, new storm sewers and water mains, drainage upgrade, sidewalks, irrigation systems, street lighting, easement acquisition, road reconstruction and underground conduit/manholes. (Exhibit 2, Apx 94b). The estimates included approximately $17 million for the cost of relocating lines underground, a sum that included the costs of Edison and its lessees. (*Id.*, Apx 94b). To facilitate the underground relocation of the utility lines, the City advanced the several million

dollar cost of the underground conduit and manhole construction. Edison itself estimated the cost of the balance of the underground relocation at $2,787,455.00. (Exhibit 9, Apx 54b). The City has expended its own funds to accomplish this reconstruction, a necessary investment that makes it unlikely that many other local governments will pursue similar projects.

Telegraph Road is unquestionably a heavily congested business district. The extensive legislative findings made by the Taylor City Council in the Telegraph Road Relocation Ordinance include a finding that "Telegraph is a heavily congested business district in the City, serving hundreds of businesses and accommodating thousands of vehicles daily traveling at high rates of speed along Telegraph and into and out of these businesses." (Exhibit 8, Apx 46b). A Telegraph Road traffic study cited by Edison stated that Telegraph Road is "the main north/south boulevard which runs through the City of Taylor and carries approximately 70,000 vehicles per day." (City of Taylor Traffic Study, Apx 59a-113a). The data in the traffic study for Telegraph Road demonstrates the heavy use of the roadway and supports the conclusion that it is heavily traveled.

The record also reveals the density of businesses and commercial uses abutting the road. Any road map confirms that Telegraph Road is the general business corridor in the City. (Exhibit 3, Apx 95b). The schedule of parcels, businesses, and curb cuts along four of the six miles of Telegraph that are within the City confirms the dense business usage. (Exhibit 4, Apx 96b-101b). FOIA information obtained from the Michigan Department of Transportation established that between 1989-1999 there were sixty-three automobile accidents on Telegraph involving contact with utility poles, while total automobile accidents on Telegraph Road in the City from 1995 to June, 2002 exceeded 4,800. (Exhibit 5, Apx 102b-121b).

The City's regulatory move is a valid exercise of the police power (a governmental function). Any disagreement regarding the need for underground relocation in this case is a matter for the City's legislative body and not, with all due respect, the Courts, much less the

MPSC. Acceptance of Edison's constitutional arguments would be disruptive of a long line of authority interpreting state and federal constitutional rights in the context of police power regulations.

The City is performing an intrinsically governmental function in the design and major reconstruction and infrastructure improvement of Telegraph Road. The project includes new road pavement, water mains, sidewalks, street lighting, conduits for utilities and median irrigation, at major expense to the City and other governmental contributors. The director of economic development for the City explained that the "reconstruction of Telegraph Road is the largest public works project in the history of the City of Taylor." (Zorn Affidavit, 9/23/03). He noted that the improvement has attracted new businesses and existing businesses have rebuilt shops and stores in response to the improvements. (*Id.*) During the performance of this project, it is only natural and healthy for the public good that the existing "scramble of overhead lines, utility poles and related facilities and equipment along, adjacent, across and over Telegraph and intersecting roads" be appropriately alleviated. (Complaint, p 4, ¶12, Apx 4b). The City's enactment of its ordinance, which constituted the reasonable performance of a non-proprietary function, clearly brings this case within the general rule, rather than its exceptions.

Contrary to Edison's argument, it has not been deprived of property. Its franchise remains unimpaired. It continues to operate within the City, which has neither terminated Edison's right to place its structures within city streets nor taken any structures. The City has merely required their relocation as part of the reconstruction project. Edison's scarcely-developed takings, due process, and impairment of contract arguments were properly rejected below and offer no grounds for reversal. Edison points to no property that was taken, nor contract that was impaired. Edison falls back on its only real complaint, that it is forced to pay for steps it must take to comply with the City's police-power traffic-safety enactment. This is not actionable.

Edison strives mightily to fashion any manner of factual distinctions here from the numerous cases previously cited by the City, in that here it is alleged that the project did not require or necessitate the underground relocation of the utility lines. Edison argues that the City had a "choice" or exercised an "option" to require relocation underground. Neither the constitution, statutes, city charter, city ordinance or case law makes any distinction between the City exercising an option or having a choice after having made a regulatory decision to require utility relocation. The requirement that Edison bear its own costs turns on whether the City exercised a governmental function in requiring the relocation, not whether the City exercised a "choice" or an "option." In *Detroit Edison v SEMTA*, 161 Mich App 28, 30-31; 410 NW2d 295 (1987), for example, one could say the City of Detroit had a "choice" or "option" not to build the People Mover or build it somewhere else; however, the courts have never viewed this as the test. Rather the sole issue is whether the relocation was triggered by a governmental function in the legitimate exercise of police power to protect the public health, safety and welfare. See also *Detroit Edison v Detroit*, 180 Mich App 145, 148-149; 446 NW2d 615 (1989) (expansion of Cobo Hall, resulting in vacation of streets and relocation of utilities, was a governmental function requiring Detroit Edison to bear the relocation expense); *Michigan Bell v Detroit*, 106 Mich App 690, 693-696; 308 NW2d 608 (1981) (construction of a sewer facility is a governmental function requiring utility to remove its facilities at its own expense where necessary to protect the public health or general welfare). As to that, Edison offers no response. This Court is "not authorized to determine the validity [of the ordinance] by its own sense of the wisdom or expediency of the action taken, nor weigh in a nice balance the question of its justice in a general sense." *City of Monroe v Postal Telegraph Co*, 195 Mich 467, 471; 162 NW 76 (1917). Since the early 1900s and before, courts have recognized that a utility company, which has placed its structures in the street may be compelled to relocate them underground by a city's valid police power measure. *Monroe*, 195 Mich at 472. As pointed out in *US West*

Communications v Longmont, improving city aesthetics, enhancing traffic safety, and better protecting electric facilities are legitimate police power rationales for necessitating utility relocation at a utility's expense. 948 P2d 509, 521-522. Such is the case with the City of Taylor's ordinance. It constitutes a valid enactment as part of the City's reasonable control of its streets as contemplated under Michigan law.

Edison also asserts that the governmental/proprietary distinction is unworkable. But Edison fails to discuss the governmental/proprietary distinction embodied in the Michigan Governmental Tort Liability Act, MCL 691.1401 *et seq*, which has consistently been applied since the statute was enacted. Although the statute is not, by its terms, applicable here, it embodies a legislative policy decision governing the best way to analyze this traditional and important distinction in government law. Thus, if this Court is concerned about whether the distinction between governmental and proprietary has been drawn with sufficient clarity, it can borrow the tests set forth in MCL 691.1401 *et seq*. Alternatively, the Court can maintain the traditional common-law distinction long-recognized in this context of police power regulation of utilities. See e.g. *New Orleans Gaslight Co, supra*; *Village of Jonesville v Southern Michigan Telephone Co*, 155 Mich 86; 118 NW 736 (1908); *New York v New York Telephone Co*, 278 NY 9; 14 NE2d 831 (1938). Under either test, the City's ordinance unquestionably constitutes a police power regulation enacted as part of the City's exercise of a governmental function. Thus, Edison is responsible for its costs to comply with the regulation.

Edison also spills a lot of ink discussing the present tariff governing the "assignment of costs for the replacement of Edison's overhead facilities with underground facilities." (Edison's Brief, p 22). This tariff does not govern a city's right to enact police power regulations regarding structures within its streets. It deals with the assignment of costs for purposes of rate-making. Although Edison blurs the distinction between the City's constitutionally-protected right to exercise control of its streets and the MPSC's rate-making authority, acceptance of Edison's

position would vastly expand MPSC authority while abrogating the long-cherished local control of the streets. Edison cites no authority in support of this approach and it should be rejected.

This Court can harmonize article 7, § 29, MCL 460.6(1), and the City's ordinance by recognizing that the City's ordinance is a reasonable and valid police power measure within the sphere of constitutionally-protected local control of the streets. Edison is responsible for bearing the costs of complying with the regulation just as it is responsible for bearing the costs of all valid state and local police power enactments. Edison is entitled to seek to include appropriate costs in its submissions to the MPSC, which then analyzes the information to determine whether it will have an impact on rates as it issues tariffs governing rates. Under this approach, the MPSC can fulfill its statutory purpose but is not allowed to exercise authority that is contrary to requirements of other "law," including constitutional law such as article 7, § 29.

ARGUMENT III

THE CITY'S ORDINANCE IS NOT PREEMPTED.

For the first time in the Court of Appeals, Edison argued that the City's power is limited by certain Michigan statutes. (Edison's Brief, pp 16-17). Edison also raised a state law "preemption" argument. *Id.* at 21, *et seq*. Despite the City's contention that the Court of Appeals should not allow Edison to raise the arguments when it failed to do so at the trial court level,[8] the Court of Appeals addressed and decided the issues, holding that they lack merit.

Edison cites MCLA 247.183(1) for the position that, having allowed Edison to place the lines overhead in the first place, along Telegraph Road, the City is forever barred from requiring Edison to relocate the lines underground. In fact, cases decided by the Court of Appeals (and this Court) adversely to Edison establish that a utility does not have a right to forever maintain its equipment at a particular location or in a particular manner (i.e., above ground). See e.g. *Detroit Edison v Detroit*, 332 Mich 348; 51 NW2d 245 (1952); *Detroit Edison v SEMTA*, 161 Mich App 28; 410 NW2d 295 (1987); *Pontiac v Consumers Power*, 101 Mich App 450, 453; 300 NW2d 594 (1980) *lv den* 410 Mich 908; 302 NW2d 845 (1981). See also, Const 1963, art 7, § 29.

Edison also argues that, because Telegraph Road is a state trunkline, MCLA 247.184 gives the State Highway Commission sole power to consent to the manner of construction of the utility along that road. Beside being waived by Edison's failure to raise it in the trial court, this argument utterly lacks merit. The statute cited by Edison does not expressively preclude concurrent regulation over the road by the City. *Jones v Ypsilanti*, 26 Mich App 574, 579-580; 182 NW2d 795 (1970); 1977-1978 Michigan OAG No. 5307 (5/18/78). It is fundamental that a municipality has regulatory authority within the scope of art 7, § 29 of the Michigan Constitution

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[8]The appellate courts ordinarily do not consider issues raised for the first time on appeal. *In re RFF*, 242 Mich App 188, 204; 617 NW2d 745 (2000); citing *Booth Newspapers v University of Michigan Board of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

over roads passing through the municipality's boundaries, so long as such regulation is not arbitrary, or unreasonable, or in conflict with state regulations. See also, *Union Twp v Mt. Pleasant*, 381 Mich 82, 90; 158 NW2d 905 (1968); *South Haven v South Haven Charter Twp*, 204 Mich App 49, 52; 514 NW2d 176 (1994). In *Dearborn v Sugden & Sivier, Inc*, 343 Mich 257; 72 NW2d 185 (1955), the Supreme Court held that the legislature could not deprive a municipality of this right to reasonable control over its streets, even a state trunkline, and to the extent that the legislature had attempted to do so, the resulting statute would be invalid. Other decisions recognizing a local right to regulate include *Robinson Twp v Ottawa County Board of Road Comm'rs*, 114 Mich App 405; 319 NW2d 589 (1982) (township had the authority to enact a truck route ordinance which covered county roads); and *Trenton v Wayne County Road Comm*, 116 Mich App 212, 217; 323 NW2d 340 (1982) (municipality and the county had concurrent, "constitutionally reserved power of reasonable control of highways and streets within their respective city and county limits"); see also, *Monroe, supra*, 195 Mich 467, 470-471.

In *Detroit Edison v Wixom*, 10 Mich App 218; 159 NW2d 230 (1968) *rev'd on other grounds* 382 Mich 673; 172 NW2d 382 (1969), the Court of Appeals held that municipalities have the authority to regulate electricity providers, as to the height of power lines. Although the court ultimately held the ordinance invalid as unreasonable, given investments in adjoining land, 382 Mich 673, 685-686, a majority of the Court favored the proposition that the MPSC's authority was not preemptive of municipal regulation of utility companies. The lead opinion, concurred in as to this point by enough other justices to comprise a majority, indicates:

> The Public Service Commission statute does not vest the Commission with authority to determine the route of high tension lines except as those routes bear upon "rates, fares, fees, charges, services, rules, conditions of service" or the "formation, operation or direction of such public utilities." [citations omitted]. ... The Commission is not empowered to assume the role of arbiter between the utility and the city. The company's cost-conscious approach to route selection and the Commission's rate-and-service-conscious evaluation of the selected route are too closely aligned.

> Public policy is broader than the public's interest in adequate electric service. The Commission represents all of the people in their capacity as users of electricity; the city represents some of the people in their multiple concerns as members of a local community.
>
> The majority opinion of the Court of Appeals correctly analyzed the preemption argument, and concluded that the zoning law [citing Michigan statute on zoning] empowers cities to make reasonable regulations which apply to electric utilities.

Detroit Edison v Wixom, 382 Mich 673, 682-683.

Edison's preemption argument is based on the faulty notion that the MPSC regulation discussed above, R460.516, and the MPSC's statutory authority, MCLA 460.6(1), somehow circumvent the City's exercise of its authority under art 7, § 29 of the Michigan Constitution. There is no such conflict, and even if there were, the statute and rule cited by Edison would have to give way to the City's constitutional power. Given the municipality's authority in this situation, and concerning this particular subject matter, there is no basis for preemption. *Rental Property Owners Ass'n v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997); citing *People v Llewellyn*, 401 Mich 314, 323-324; 257 NW2d 902 (1977).

Edison's position is foreclosed by the established guidelines for resolution of state law preemption issues. The MPSC's authority is limited "as otherwise provided by law," MCL 460.6(1), *supra*, and thus, does not provide for "exclusive" authority in a manner at odds with the City ordinance at issue here. Edison has cited no legislative history from which preemption may be implied. The state's regulatory scheme, over which the MPSC has authority is not all-encompassing; and the nature of the subject matter does not demand exclusive state regulation in order to achieve uniformity, given the lengthy history of municipal authority with regard to the placement of power lines. *Rental Property Owners Ass'n*, 455 Mich at 257; see also, *Frens Orchards v Dayton Twp Board*, 253 Mich App 129, 132-133; 654 NW2d 346 (2002). The Court of Appeals correctly held that the statute conferring jurisdiction on the MPSC for rate-making

does not occupy the field, no direct conflict exists, and the guidelines for evaluation of preemption favor the City.

Edison argues in part on page 15 of its brief that the State "has occupied the field" and that the City's local control of its streets must yield to statewide concerns. As to the alleged ways in which the State has supposedly occupied the field, Edison mentions the existence of "multiple statutes" authorizing the MPSC to regulate public utilities and the MPSC's exercise of that authorization by adopting specific rules and tariff provisions, again unidentified, that comprehensively govern the replacement of overhead lines with underground facilities, including provisions as to who pays for such replacements. Lacking further specificity, Edison cannot possibly advance such an argument. In any event, Edison is simply mistaken when it announces that the State has "occupied the field" in this area. The phrase "occupied the field" is traditionally used in conjunction with a preemption argument. Thus, it is common for a party seeking to prevail on a preemption argument to resort to such terminology. However, to accept such an argument in the context of this case is to virtually nullify the plain meaning and operation of Const 1963, art 7, § 29, which states that "[e]xcept as otherwise provided in this constitution, the rights of all ... cities ... to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government." At the same time, MCL 460.6(1) specifically limits the MPSC's authority "as otherwise provided by law," a formulation that is inconsistent with a legislative desire to have the MPSC occupy the field. In short, it is apparent that the State does not occupy the field as to any relevant conduct here.

Equally lacking in merit is Edison's reliance on the notion of paramount authority or paramount jurisdiction. Paramount jurisdiction necessarily assumes that the entities involved possess concurrent jurisdiction but provides for the fact that, under certain circumstances and conditions, one entity's jurisdiction may have to take precedence over another's. That is not the situation here. Const 1963, art 7, § 29 directs that jurisdiction over streets and public places

within a local government remains with local units of government, such as cities. Thus, where, as here, matters are strictly referable to reasonable control of the streets, the language of Const 1963, art 7, § 29 contemplates that cities retain their local control jurisdiction even in the face of a claim that the State somehow had paramount authority.

Edison's preemption argument is squarely predicated on the claim that the statutes creating the MPSC occupy the field and not on an contention that the ordinance conflicts with any state law. (Edison's Brief, pp 31-35). Edison points to no conflicting statutes. Instead, it urges this Court to break new ground by ruling that the MPSC's authority is so pervasive that it supercedes local police power regulations. Edison offers no Michigan authority recognizing such an approach, fails to adequately distinguish existing authority which contravenes such an approach, and provides no limiting principle to cabin the authority of the MPSC if its rule were adopted. Its preemption argument was properly rejected below and the lower court rulings should be upheld.

ARGUMENT IV

THE CIRCUIT COURT HAD JURISDICTION BECAUSE THE CASE INVOLVES THE CITY'S CONSTITUTIONAL POWERS AND FALLS OUTSIDE THE MPSC'S JURISDICTION.

The doctrine of "primary jurisdiction" focuses upon whether the question presented is "administrative in character such as to preclude the state court from inquiring into and adjudicating [the issue] without application having been first made to" the administrative body, such as the MPSC. *Travelers Ins v Detroit Edison*, 465 Mich 185, 194; 631 NW2d 733 (2001); quoting, *Anderson v Chicago M & St PR Co*, 208 Mich 424, 429; 175 NW 246 (1919). The primary jurisdiction of the MPSC attaches to customer claims arising under MPSC tariffs. *Travelers Ins*, 465 Mich at 195; *Rinaldo's Construction v Michigan Bell*, 454 Mich 65, 66-67; 559 NW2d 647 (1997). A claim which arises "solely out of the contractual relationship between the [utility] and the [customer]" for example, falls within the MPSC's primary jurisdiction. *Rinaldo's*, at 67. The doctrine of primary jurisdiction reflects "practical concerns regarding respect for the agency's legislatively imposed regulatory duties, ... reinforces the expertise of the agency to which the courts are deferring the matter, and avoids the expenditure of judicial resources for issues that can better be resolved by the agency." *Travelers Ins*, 465 Mich 185, 197.

The "primary jurisdiction" doctrine does not apply here. Under MCLA 460.6(1), the Legislature demarcated the MPSC's authority by limiting it "as otherwise provided by law":

> The Public Service Commission is vested with complete power and jurisdiction to regulate all public utilities in the State except a municipally owned utility, the owner of a renewable power production company as provided in Section 6d, and except as otherwise provided by law. The Public Service Commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The Public Service Commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas and pipeline companies; motor carriers; and all public

transportation and communication agencies other than railroads and railroad companies.

The phrase, "except as otherwise provided by law," includes the Michigan Constitution, art 7, § 29, and Michigan statutes, MCLA 117.4(h) and MCLA 247.185, *supra*, which grant the City of Taylor the power to reasonably direct the placement of power lines through the exercise of its police power. Thus, the MPSC's regulatory authority does not extend to these matters, which are constitutionally and statutorily reserved to municipalities.

The doctrine of primary jurisdiction is commonly applied to delineate the jurisdiction of the MPSC and of the circuit courts to hear and to entertain claims arising from disputes between utilities and their customers. *Stark Steel v Michigan Consolidated Gas Co*, 165 Mich App 332, 335; 418 NW2d 135 (1987) citing *Valentine v Michigan Bell*, 388 Mich 19; 199 NW2d 182 (1972). This is not such a case. The City of Taylor is engaged in this controversy, not as a customer, but as a municipality regulating utilities and streets/roads within its borders. In *Stark Steel*, the Court of Appeals stated the following principles applicable to the primary MPSC jurisdiction analysis:

1. If the claim challenges the prospective application of a tariff, code, or regulation promulgated by the PSC, then jurisdiction is properly in the MPSC.

2. If the claim alleges a clear violation of a tariff or code, the validity of which is assumed, then jurisdiction is in a court of general jurisdiction. The tariff or code forms part of the contract between the parties, and the breach of such contract may be heard in the circuit court.

3. If the claim covers some action by the utility outside of the regulations of the MPSC, then jurisdiction is in a court of general jurisdiction.

4. If the claim sounds in tort, and not in contract, then jurisdiction is properly in a court of general jurisdiction.

165 Mich App 332, 335-336. This case is action by the utility "outside of the regulations of the Public Service Commission." *Id.*

Edison relied below on R460.516 of the MPSC to bring this litigation within the purview of the MPSC. But that rule is not on point. It provides:

> (1) Existing overhead residential, commercial and industrial electric distribution and service lines anywhere in the state shall be replaced with underground facilities at the option of the affected customer or customers.
>
> (2) Before construction is started, the customer shall be required to pay the utility the depreciated cost (net cost) of the existing overhead facilities plus the cost of removal less the salvage value thereof and, also, make a contribution in aid of construction in an amount equal to the estimated difference in cost between new underground and new overhead facilities including, but not limited to, the costs of breaking and repairing streets, walks, parking lots and driveways, and of repairing lawns and replacing grass, shrubs, and flowers.

The rule governs the rates a customer will pay for exercising its option to replace the electric distribution and service lines on its property with underground lines. It does not address a police power municipal regulation controlling equipment in a city right-of-way. Under the exercise of its administrative authority or under any administrative rule, the MPSC lacks the authority to rewrite or to override art 7, § 29 of the Michigan Constitution, or Edison's statutory authority with regard to electric line relocation. Thus, by definition, R460.516, and the related tariff Edison cites, can have no effect on the proper result in this case. At best, if it arguably governed this dispute, it would create a constitutional question for resolution. Constitutional questions, particularly implicating the scope of the MPSC's powers, should be resolved in a court of general jurisdiction.

On appeal before this Court, Edison and the MPSC point to Rule 460.517 as a basis for MPSC jurisdiction. In R460.517, the MPSC adopted a requirement that Edison should bear this cost if mandated by ordinance:

> The utility shall bear the cost of construction where electric facilities are placed underground at the option of the utility for its own convenience or where underground construction is required by ordinance in heavily congested business districts.

Edison has not disputed that Telegraph Road is a "heavily-congested business district." But it argues that the rule is inapplicable to the cost of relocating existing facilities. By its terms, R460.517 does not differentiate between new construction and the relocation of existing facilities.

This controversy presents no issue which falls beyond "the conventional experience of judges," nor any which would require the exercise of "administrative discretion." *White Lake Ass'n v Whitehall*, 22 Mich App 262, 280; 177 NW2d 473 (1970). The case poses questions of law involving the City's regulatory and constitutional power and authority to direct a utility to put these lines underground, at the utility's expense. Notwithstanding the regulation Edison cites, Michigan courts have regularly ruled upon similar disputes between various municipalities and Edison. E.g., *Detroit Edison v Detroit*, 208 Mich App 26; 527 NW2d 9 (1994); *Detroit Edison v SEMTA*, 161 Mich App 28; 410 NW2d 295 (1987).

The City raised no issue concerning the adequacy of Edison's equipment, facilities, or services. Judicial deference to the MPSC's administrative discretion in its regulatory area is not required. Only "customer claims anticipated by the tariffs and regulations" of the PSC "are governed by those tariffs," so that relief "must first be sought before the MPSC." *Rinaldo's Construction v Michigan Bell*, 454 Mich 65, 73-74; 559 NW2d 647 (1997). As this Court noted in *Rinaldo's* at 75:

> The complexities of the regulatory scheme will generally not be implicated where the plaintiff's claim is for personal injury, property damage not covered by the tariffs, or other tortious activity, because the regulatory scheme is not designed to address these matters.

The same is true here. This is not a case in which primary jurisdiction applies because the matter involves the interpretation of contracts in light of the MPSC's statutory authority to review such agreements for compliance with its rules and regulations; *Dominion Reserves v Michigan Consolidated Gas Co*, 240 Mich App 216; 610 NW2d 282 (2000); nor one in which the City

advances a damages claim based on violation of an MPSC tariff. Compare, *Durcon Co v Detroit Edison*, 250 Mich App 553; 655 NW2d 304 (2002). The City's claim implicates no tariff or MPSC regulation. It calls for application of no administrative expertise. Rather, it is divorced from the MPSC's administrative bailiwick. *Michigan Basic Property Ins Ass'n v Detroit Edison*, 240 Mich App 524; 618 NW2d 32 (2000) (tort claim which did not implicate the tariffs falls within the Circuit Court's jurisdiction; primary MPSC jurisdiction inapplicable). The case does not fall "within the special competence of an administrative agency." *Travelers Ins v Detroit Edison*, 465 Mich 185, 197. The City's complaint raised a legal issue seeking a declaration of the City's legal rights, an issue which has been decided by the courts on numerous occasions.

The MPSC has no specialized knowledge in determining what is a governmental function nor deciding the constitutionally-imposed boundaries of its authority as MPSC actions may impinge on a city's right to reasonable control of its streets. The circuit courts, the Court of Appeals, and this Court have consistently addressed the merits of issues posed in this area of the law. Those decisions have had no adverse impact on the commission's regulatory sway. None of the justifications for deferring to the commission applies here. Thus, the circuit court and the Court of Appeals properly declined to defer to the MPSC's claimed jurisdiction and this Court should uphold those rulings.

RELIEF

WHEREFORE, Plaintiff-Appellee the City of Taylor, by and through its attorneys, respectfully requests that this Court affirm the judgment in favor of the City and grant it such other relief as is proper in law and equity.

Respectfully submitted,

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